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TRANSATLANTIC ATTITUDES TOWARD SELF-INCRIMINATION

By
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Recent decisions of the Supreme Court regarding the rights of a criminal defendant before and during trial have been considered in legal periodicals *in extensio*, and some might feel *ad nauseam*. In particular, those decisions which touch upon the Fifth Amendment privilege against self-incrimination have stirred some of the liveliest academic debates which modern American law has known. To re-open the subject, especially in a journal such as the *American Criminal Law Quarterly* is therefore to be justified on special grounds. For an outsider such as myself to do so, requires yet further explanation, and this I shall try to give.

The U.S. Supreme Court has always upheld respect for the common law, and many of the constitutional guarantees regarding criminal proceedings are derived from common law concepts. Furthermore, it has been the flattering practice of American lawyers and courts alike to interest themselves in legal developments on my side of the Atlantic. Similarly, English lawyers nowadays treat American decisions with great respect. It may therefore be desirable to emphasize that "common law" is no longer synonymous in England with "criminal law" and is becoming less so. To take but one striking example, majority verdicts have now become permissible under the Criminal Justice Act (1967), recently given the royal assent.[1]

It is therefore with mixed feelings that an English lawyer looks upon the use made of some aspects of English law to support Supreme Court decisions regarding self-incrimination. For example, in *Miranda v. Arizona*, two long footnotes were appended to the majority opinion, dealing with the English "Judges' Rules."[2] These rules provide that a suspect must be cautioned by the police that he need not say anything, and also provide that if he makes a statement, it should be taken down in particular form. I cannot help feeling, after reading the Supreme Court's opinion, that if he took at its face value what he gleaned from the law reports, an American lawyer might form an erroneous impression of the state of English law on the subject of confessions. Perhaps that

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1. See, for a treatment of this reform, which is readily accessible in America 58 *Journal of Criminal Law, Criminology and Police Science* 211.

2. 384 U.S. 436, 487–88 (1966), notes 57 & 58.

does not matter in itself. The Supreme Court's majority opinion in *Miranda* would stand as a principled decision without calling in aid any English authority. But in view of the fact that the Supreme Court finds it tactically expedient to use such material, it may be pertinent to draw attention to the very real divergences of opinion which exist between the United States and England.

There are really three distinct aspects of the privilege against self-incrimination as it is usually understood. First, it may refer to pretrial procedures and the admissibility of confessions. Second, it may refer to the right of the accused to remain silent at his own trial. Third, it may deal with the propriety of counsel or the judge commenting to the jury on an accused's failure to give evidence on his own behalf. In each of these matters, English and American views seem to be moving apart. This is particularly apparent from a new report on *The Interrogation of Suspects* by an influential, non-partisan organization of British lawyers.[3] If the proposals of this body are accepted, the gulf between English and American criminal law will become wide indeed. For the sake of convenience, the differences in attitude to self-incrimination in the United States and England will be discussed under the three divisions already mentioned.

I. Self-incrimination Prior to Trial

The only essential requirement of the common law regarding the admissibility of confessions was that they should be voluntary. During the 19th century, a great many confused and unnecessary elaborations were made on this rule, but the fundamental principle remained. The common law, however, was a law without a police force, and the special problems of police questioning never became the subject of any consistent body of judicial attitudes. In order to remedy this, the Judges' Rules were issued for the guidance of police officers in the early years of the 20th century. They were not, and are not, law; they are merely advice. A breach of the Rules may result in the exclusion of a confession, but not necessarily. They have been revised from time to time, the latest revision (quoted in *Miranda*), taking place in 1964. They suggest that "cautions" should be administered to a suspect at various stages in a police investigation; that a person should be advised of his right to legal advice; and that once a man is charged, police questioning should normally cease.

3. *The Interrogation of Suspects*, Justice Committee on Evidence, London (1967); British Report on Interrogation of Suspects, 1 CRIM. L. REP. 3155 (1967).

In all these matters, it is true, the Judges' Rules are similar to the purport of the Supreme Court decisions in *Escobedo v. Illinois*[4] and *Miranda v. Arizona*.[5] But in underlying rationale, there is no similarity. The English Judges' Rules occupy a twilight position in the law; they are not law at all, but they have been followed as relevant in applying the common law test of voluntariness. By contrast, the Supreme Court rested its decisions on the Constitution. Thus, the result of *Escobedo* and *Miranda* is to entrench these rules for the guidance of the police in American law to a far greater extent than ever the Judges' Rules did in English law.

It would be impertinent for me, as a foreign lawyer, to criticize the American Supreme Court's interpretation of the American Constitution in an American journal. Nevertheless, its decision that the law of confessions is governed by the privilege against self-incrimination contained in the Fifth Amendment is open to some doubt. The amendment only gives that privilege insofar as an accused may not be compelled to be a witness against himself. *Prima facie*, one might think, therefore, that it did not apply to extra-judicial confessions which are subsequently admitted into evidence.[6] Furthermore, even if the Fifth Amendment does extend to extra-judicial confessions, it only provides that a person should be free of *compulsion*—and it is arguable, at least, that the combined effect of *Escobedo* and *Miranda* is not merely to prevent compulsion, but to prevent even legitimate persuasion.

The fact is, however, that what the Supreme Court has just embedded in American criminal law by constitutional construction, the British Justice Commission is trying to abolish altogether. In their new report, they state in their preface:

> Without any dissentients, this Committee has reached the conclusion that the time is ripe to abolish the privilege of the accused to keep silent before his trial, while at the same time safeguarding him from improper pressure from over-zealous police officers. . . .[7]

Their essential recommendation is that once a person has become a suspect, the police may take him before a magistrate and question him. The suspect will be under a duty to answer questions put to him

4. 378 U.S. 478 (1964).
5. 384 U.S. 436 (1966).
6. This point is made by Senator Sam J. Ervin, Jr., in 5 AM. CRIM. L. Q. 125, 126, 127 (1967).
7. 1 CRIM. L. REP. 3155 (1967).

by the police (or their representative), and he will be told at the beginning of the interrogation by the magistrate:

> If you are brought to trial it may tell heavily against you if you have refused to answer questions at this stage. On the other hand, the answers which you give today may clear you of suspicion so that you will not be brought to trial at all; and even if you are, it may then count in your favour if you do answer here and now.[8]

A suspect would have the right to counsel at this stage, but counsel would be restricted to objections on matters of irrelevancy or privilege other than the privilege to remain silent. Furthermore, the presiding magistrate would be obliged, regardless of whether the suspect's counsel objected or not, to disallow any question he thought unfair. The questions and answers would be automatically admissible in the trial, and the report suggests that a tape recording on the interrogation should be made.

These proposals may shock some lawyers. They bring to mind two much disliked institutions in the common law world. First, they evoke the French *juge d'instruction,* whose subtle questioning of a suspect is much feared by many law-abiding Frenchmen. But the Justice committee's proposal is that the interrogation should be conducted by the police, in the presence of the magistrate, and not by the magistrate himself. Second, they conjure distant memories of Star Chamber.[9] But Star Chamber inquisitioned citizens without indicating what the charge against them was, and used the rack to loosen the tongues of uncooperative defendants. By contrast, the duty of the presiding magistrate will be to uphold standards of fairness in the examination, and the only sanction to be used against a silent suspect will be to comment on the fact at any subsequent trial his silence could work against him.

The advantage of this proposal is that it will remove all incentive to police coercion of an accused. No statement made to the police apart from those made before the magistrate will be admissible. This will prevent continual allegations of unfair extortion of confessions. The advantage to the law-abiding citizen will be that he can make a statement at the earliest possible stage to a magistrate, and thereby possibly clear himself.

II. The Right to Remain Silent at Trial

At common law, an accused could not give evidence on his own behalf even if he wished, because his interest in the proceedings was so

8. 1 CRIM. L. REP. 3155, 3156–57 (1957).

9. For a short but readable account, *see* WILLIAMS, THE PROOF OF GUILT 36, (1955).

great that he was regarded as incompetent. This strict rule was modified in time, and the accused was allowed to make an unsworn statement from the dock. He could not be cross-examined upon this statement. However, by the time of the Criminal Evidence Act, 1898, it was provided that the accused could, if he wished, go onto the witness stand, be sworn, and examined and cross-examined by counsel. This act did not abolish the right to make an unsworn statement from the dock. Neither did it compel a defendant to be sworn as a witness if he did not so wish.

The Fifth Amendment privilege in America is two-pronged. A defendant may not be compelled to go into the witness box at all. If he does, he may in many jurisdictions limit cross-examination by narrowing the scope of his direct testimony.[10] But in England, once an accused has elected to make a sworn statement from the witness stand, he has no such right. On the other hand, in America there is no right to make an unsworn statement.

Probably, it makes little difference whether the American Fifth Amendment or the English evidentiary privilege is evoked; the practical effect is that the accused can avoid answering questions. Here again, however, the Justice Committee reports that:

> . . . there might be strong arguments in favour of limiting or abolishing the privilege at the trial itself, and that in return for the increased protection which the accused is to be afforded at the interrogation stage, the accused might well be required to go into the witness-box and answer questions.[11]

The Committee did not consider the matter in its present report, because the Criminal Law Revision Committee has certain aspects of this matter under consideration at the moment.

The truth is that the present privilege is extremely favourable to the defendant. As Jeremy Bentham put it:

> If all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, and guilt invokes the privilege of silence.[12]

The current Justice Committee report is some evidence that Bentham's view is gaining support in England after 130 years.

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10. *See generally* 8 WIGMORE, EVIDENCE §§ 2277–78 (McNaughton rev. 1961).
11. 1 CRIM. L. REP. 3155, 3158 (1967).
12. 3 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, 131 *et seq.* (London 1827).

III. Freedom from Comment on Accused's Failure to Testify

It was settled by *Griffin v. California*[13] that neither a prosecuting attorney nor a presiding judge may comment on a defendant's refusal to testify in an American criminal trial. This Supreme Court decision was, like *Miranda* and *Escobedo*, rested upon the Fifth Amendment. Any comment made by prosecutor or judge would violate the Constitution because "it cuts down the privilege by making its assertion costly."

This is not the position in English law. By the Criminal Evidence Act, 1898, counsel for the prosecution may not comment upon the accused's refusal to testify. But the Court of Criminal Appeal has consistently held that the judge may.[14] It is apparently proper for a judge to tell an English jury that they "may draw their own conclusions,"[15] but not to tell it what conclusions it should draw. Thus, the jury may be told clearly that the accused could have testified but chose not to; *Griffin* seems to prohibit even this. Of course, the inferences drawn by a jury are not likely to be favourable.[16]

The prohibition of comment by the prosecution is designed to prevent a closing speech to the jury which positively suggests to the jury that the *only* inference from the accused's silence is that he is guilty.

These differences in English and American law as they presently stand and the indications of possible changes in English law in the future are not rehearsed with any motive of proving the superiority of English law. On the contrary, the speed of change and receptiveness to new ideas which characterize American law are the subject of some admiration in England. Nevertheless, a comparison is always valuable, if only because it gives an opportunity to reconsider problems in a fresh light. There is a suspicion, however, that the U.S. Supreme Court is erecting a new constitutional right.[17] By continually interpreting the Fifth Amendment to include such matters as confessions, there may be another constitutional right created: the right of a criminal to a good chance of an acquittal. Perhaps that is a desirable thing. But it may be of interest to American lawyers to know that English law is moving away from the view that, in a criminal defendant, silence is a virtue.

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13. 380 U.S. 609 (1965).
14. R. v. Rhodes, 1 Q.B. 77 [1899].
15. R. v. Corrie, 68 J.P. 294, 297 (1904).
16. *See* O'Regan, *Adverse Inferences from Failure of an Accused Person to Testify,* 1965 Crim. L. Rev. (Eng.) 711.
17. The right to privacy was announced to be a constitutional one in Griswold v. Connecticut. 381 U.S. 479 (1965).